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# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1932.

No. [redacted] 32

The John K. & Catherine S. Mullen Benevolent Corporation, a corporation, Petitioner,

—vs—

United States of America, Respondent.

## PETITION FOR WRIT OF CERTIORARI
## To the United States Circuit Court of Appeals for the Ninth Circuit
## and
## SUPPORTING BRIEF

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Filed April ....., 1933,

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*During the pendency of this suit the official designation of the Idaho statutes has been changed from "C. S." (Compiled Statutes of Idaho, 1919), to "I. C. A." (Idaho Code Annotated, 1932). To conform to the record and prior opinions, the new designation is not used in the petition and brief, except that the corresponding numbers are shown in this index.

Note: All emphasis upon quotations or parts thereof in this brief are supplied by the authors.

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1932.

The John K. & Catherine S. Mullen Benevolent Corporation, a corporation, Petitioner,
—vs—
United States of America, Respondent.
No. .....

## PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:—

Your petitioner respectfully shows:

## SUMMARY STATEMENT OF MATTERS INVOLVED

In 1915 and 1916 three local improvement districts were organized in the city of American Falls, under the provisions of §§ 3999, et seq. I. C. S. An abstract of these statutes is necessary to a full understanding of the issues. The first step is the ordinance declaring the intention to create the improvement, describing the particular property or section of the municipality to be improved, designating

the general character of the improvement, estimating the cost thereof, and advising that the cost is to be assessed against the contiguous property (§ 4003 I. C. S.). Provision is made for protests, and then follows the ordinance creating the improvement district, which "shall provide that such improvement shall be made and that the cost and expense thereof shall be taxed and assessed upon all property in such local improvement district" proportionately (§ 4005 I. C. S.). Section 4007 I. C. S. provides:

> "Whenever any **expense or cost of work** shall have been assessed on any land the amount of **said expenses shall become a lien upon said lands,** which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure * * *"

The municipality may "provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue, in the name of the municipality, improvement bonds of the district, **which shall include the adjoining, contiguous, and approximate property** liable to assessment for such local improvements payable in instalments of equal amounts each year, which bonds shall, by their terms, be made payable on or before a date not to exceed ten years * * *" (§ 4014 I. C. S.). The latter section further provides that other and subsequent series of bonds may be

issued for the improvement of property in the same district, but the lien of the second or third series of bonds "shall be a subsequent lien * * * to the unpaid, unliquidated and unredeemed outstanding bonds, theretofore issued for the original improvement * * *" Provision is made for annual levies to meet instalments and interest (§ 4017 I. C. S.), the form of the bonds (§ 4018 I. C. S.), and for the redemption of their lots by the respective owners, in which event such property "shall not thereafter be liable for further special assessments for the cost of such improvements **except as hereinafter provided.**" (§ 4019 I. C. S.). Section 4024 I. C. S. provides, in part:

> "Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by the owners of property in the local assessment district where the same is made, it shall be lawful, and the city council or trustees or other authorized board or body is hereby directed and authorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement, such reassessments to be made and collected in accordance with the provisions of the law or ordinance existing at the time of its levy."

If the municipality neglects or fails to pay the bonds or collect the assessments when due, the bondholder may foreclose his lien in an action in his own name, recovering costs, attoreys fees and a five per cent penalty," in addition to the amount of such bonds and interest there-

on", and "**such bonds shall be equal liens upon the property** for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land." (§ 4023 I. C. S.) The municipality is not liable, except for the collection of the assessments (§ 4026 I. C. S.).

The foregoing statutes govern the creation of districts for the improvement and building of streets. Under such provisions district No. 8 was created. The ordinances pertaining thereto and full transcript of the proceedings will be found in plaintiff's exhibit 6 (R. 142).

Districts for the construction of sewers are governed by §§ 4121 to 4151, inc., I. C. S. The latter are substantially identical with the provisions relative to street improvements. Districts Nos. 1 and 2 were created under the latter statutes. The ordinances pertaining thereto and full transcripts of the proceedings will be found in plaintiff's exhibits 4 and 5, respectively (R. 142).

Bonds were issued by the three foregoing districts and were purchased by J. K. Mullen, who transferred the same to petitioner (R. 63, 65, 68). All of the bonds are payable to bearer. The bonds remaining unpaid appear as plaintiff's exhibits 1, 2, and 3, respectively (R.141, 142). The original assessments levied proved insufficient to pay the bonds for the following major reasons, as pointed out by witness Bowen (R. 111-118): 1) Lack of

conformity between the denominations of the bonds and the collections realized from the assessments from time to time, resulting in moneys remaining idle frequently; 2) In making the original assessments and levies no allowance was made for the 1½% collection fee (R. 117), which §3224 I. C. S. allows the county for collecting levies of such improvement districts; 3) The set-up on the assessment rolls for interest did not provide for interest on the bonds the first year, resulting in the use of money received for principal payments to meet interest requirements (R. 117-8); 4) Insufficient interest charges on delinquent taxes as compared with interest on bonds (R.118); and 5) Non-payment of taxes by some of the owners in the improvement districts. Therefore, reassessment ordinances were enacted by the municipality in July, 1928 (plaintiff's exhibit 16, R.144), apparently under authority of § 4024 I. C. S., supra, p. 3. The latter section governs reassessments in districts for street improvements. A similar section (4141) governs reassessments in sewer districts. The trial court found that these reassessments were made by the municipality "in compliance with the statutory mandate and for its own protection." (R. 70).

Beginning in 1920 or early in the spring of 1921 and between such date and 1926 (R. 131), the respondent purchased or condemned all of the lands embraced within the three above improvement districts as a site for Recla-

mation Act storage reservoir, under authority of the act of June 17, 1902 (43 USC'A §§ 411, et seq.). However, no proceedings in eminent domain were had against the petitioner or its successor in interest, J. K. Mullen (R.71, 72), and therefore the effect of any condemnation proceedings is not in issue. Apparently condemnation was resorted to only in the case of the twelve or fourteen pieces of land occupied by the dam proper (R.135). The lands were largely acquired by individual purchase contracts between the respondent and the individual owners, a sample of such contracts appearing as defendant's exhibit No. 1 (R.144). These contracts required each owner to convey his land to the United States within sixty days after the government notified such owner that his contract had been approved by the Bureau of Reclamation. The following words of paragraph 7 of such contract are pertinent:

> "7. Liens or encumbrances existing against said property may, at the option of the United States, be removed at the time of conveyance by reserving from the purchase price the amount necessary, and discharging the same with the money so reserved. * * *"

The foregoing contract bears date December 9, 1925, but the date of none of the other contracts appears in the record. The deeds which were executed at later, but unknown, dates permitted the owners to remove the buildings from their respective lands not later than January 1,

1927 (R.199). The last building actually removed from the reservoir site was the Grand Hotel, which was late in the winter of 1925 or early in the spring of 1926 (R.123). The reservoir started filling in 1926, and the entire reservoir site was flooded "on or shortly after January 1, 1927." (R. 76). Naturally, the purchase of these lands by respondent and the complete flooding of the lands comprising said improvement districts Nos. 1, 2, and 8 rendered petitioner's property entirely valueless. Thereby petitioner's valuable bonds were permanently and absolutely transformed into worthless scraps of paper.

The government officials in charge at the dam site knew of petitioner's unpaid bonds, and consonant with the authority contained in the above quoted paragraph seven of the contracts of purchase (R.133), held $13,000 or $14,000 out of the amounts agreed to be paid to the individual owners, for the purpose of paying such bonds. This sum was retained by the respondent's agents until "some time in 1929 before they paid it to the land owners* * *" (R.134, 135). Soon thereafter, and on November 25, 1929 (R.7), the immediate action was filed under the provisions of the Tucker Act (28 USCA §41, subd. 20), upon the theory that respondent's actions constituted the taking of private property for public use without compensation.

Upon this theory the trial court overruled the demur-

rer to the amended bill (John K. & Catherine S. Mullen Benevolent Corporation v United State, 40 Fed. (2) 937), and upon this theory the trial court decided the case upon its merits in favor of petitioner (R.196, et seq.), rendering judgment in the amount of the unpaid bonds held by petitioner, with interest, less certain amounts theretofore collected and lost by reason of the failure of the bank in which same were deposited (R.77, 78). The Circuit Court of Appeals for the Ninth Circuit, by an opinion filed January 23, 1933 (63 Fed. (2) 48), reversed the judgment in favor of petitioner, primarily upon the conclusion that petitioner had no interest in, or lien upon, the property within said improvement districts at the time the respondent acquired title, nor had it such a lien at the time the property was flooded (R.231); and secondarily, upon the conclusion that the suit was filed too late, giving the court no jurisdiction under the Tucker Act (R.233). These two questions are the principal ones to be considered in this petition.

A petition for rehearing filed by petitioner was denied by the Circuit Court of Appeals on March 21, 1933 (R. 235).

This proceeding does not embrace district No. 9, nor the action predicated thereon,—United States v J. K. Mullen Inv. Co., 63 Fed.(2) 56.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision so rendered by the Circuit Court of Appeals for the Ninth Circuit is in conflict with decisions of other circuit courts of appeals, in conflict with the weight of authority and in conflict with the applicable decisions of this Court, in the following major particulars, to-wit:

1. The action of the respondent and its agents in purchasing all the property within said three improvement districts and particularly in causing the same to be permanently flooded with the reservoir waters, without recognizing or paying petitioner's bonds, constituted the taking of private property for a public use without compensation, within the meaning of the Fifth Amendment to the Federal Constitution, in that said action naturally and necessarily resulted in the complete and permanent taking, confiscation and destruction of petitioner's bonds and every element of property represented thereby, including the liens of said bonds upon said lands, which bonds are property and would have been valid and enforceable but for the action complained of:

Bowers v Bloomfield, 86 Atl. 428, 45 LRANS 451;
United States v Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846;
United States v Lynah, 188 U. S. 445, 47 L. Ed. 539;
United States v Cress, 243 U. S. 316; 61 L. Ed. 746;
Pumpelly v G. B. & M. C. Co., 13 Wall. 166. 20 L. Ed. 557;
Farbwerke, et al. v Chemical Foundation, 39 Fed.

(2) 366; (affirmed 283 U. S. 152, 51 S. Ct. 403)
Morrison v Clackamas County (Ore.), 18 Pac. (2) 814;
Knowles v New Sweden Irr. Dist., 101 Pac. (Idaho) 81;

2. In deciding that the action was filed "too late," because not filed within six years of the date "the government acquired the property for a reservoir site" (R.233), the Circuit Court effectively determined that the execution of said contracts of purchase (defendant's exhibit 1) vested the full and absolute fee to the respective properties in the government, and afforded petitioner right of action immediately, the court apparently overlooking the fact that said contracts were merely agreements to convey at some indefinite future date, as well as the further fact that said contracts expressly recognized the possibility of valid liens and encumbrances, to discharge which the government was expressly authorized to withhold funds from the purchase price (par. 7, deft's ex. 1—see text thereof p. 6, supra). Petitioner's right of action against the United States accrued, not when the respective landowners' interests in the property were taken, but when petitioner's interests were taken. "The Fifth Amendment does not entitle him to be paid in advance of the taking."

Hurley v Kincaid, 285 U. S. 95, 52 S. Ct. 267;

3. If the court is correct in concluding that petitioner's

right of action accrued when the government acquired said lands, that is, when the contracts were executed, nevertheless it erred in concluding that the suit was filed too late because the record does not reveal the dates of any of the contracts, except one which bears date December 9, 1925 (defendant's exhibit 1 - R.144). The only other showing is that the first lot was acquired in 1920 or 1921, and the balance were acquired "between that time and the year 1926" (R.131). The suit was filed November 25, 1929 (R.7), but no one can know from this record that any lot, other than the first one so acquired, was actually purchased more than six years before the institution of the suit, and it is clear that the Dahlen lot (defendant's exhibit 1) was acquired within the statutory period of six years fixed by the Tucker Act. The statute of limitations is an affirmative defense which imposes the burden upon the one asserting it to prove every element necessary to establish it. This burden was not met by respondent and the plea of limitations cannot be sustained:

Johnston v Keefer, 280 Pac. (Idaho) 324;
37 C. J. 1243, note 59;
17 R. C. L. 1004;
Warner v Wickizer, 294 Pac. (Okl) 130;
Jackson v United States, 24 Fed. (2) 981; 281 U. S. 344, 50 S. Ct. 294;
Borland v Haven, 37 Fed. 394;
Haven v Borland, 159 U. S. 255, 40 L. Ed. 140.

Wherefore, your petitioner respectfully prays that a

writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and forward to this Court a full and complete transcript of the record in the proceedings in said Circuit Court of Appeals had in cause bearing docket number 6867, entitled, United States of America, appellant, vs. The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States and the rules of this Court, and the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as this Court may deem proper.

Dated at Gooding, Idaho, this 18th day of April, 1933.

THE JOHN K. & CATHERINE S. MULLEN BENEVOLENT CORPORATION, A CORPORATION,

By: W. G. BISSELL

BRANCH BIRD

Attorneys for Petitioner.

## CERTIFICATE OF COUNSEL

STATE OF IDAHO }
County of Gooding } ss.

W. G. Bissell, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the petitioner in the above and foregoing cause; that he has read and considered the foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and in affiant's judgment such petition is well founded; and that this petition is presented in good faith, and the same is not interposed for delay.

W. G. BISSELL

Subscribed and sworn to before me this 18th day of April, 1933.

P. T. SUTPHEN,
Notary Public, residing
at Gooding, Idaho.

(SEAL)

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1932.

The John K. & Catherine S. Mullen Benevolent Corporation, a corporation, Petitioner,

—vs—

United States of America, Respondent.

No. .....

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I.

### OPINIONS OF THE COURTS BELOW

The opinion of the District Court of the United States for the District of Idaho, Eastern Division, in the above cause, upon demurrer is reported in 40 Fed. (2) 937, the opinion of said district court upon the merits appears at pp. 196, et seq. of the record herein, and the opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 63 Fed. (2) 48, and also appears at pp. 207, et seq. of the record herein. The order of the latter court, entered March 21, 1933, denying the petition for rehearing, is shown at p. 235 of the record herein.

## II.

## JURISDICTION

a. The judgment of the district court was entered January 28, 1932 (R.78), while the opinion of the circuit court was filed January 23, 1933 (R.234), and the latter court's order denying petition for rehearing was filed March 21, 1933 (R.235).

b. The constitutional and statutory provisions which are believed to sustain the jurisdiction of this court are: The Fifth Amendment to the Constitution of the United States, which provides, "* * * * nor shall private property be taken for public use, without just compensation." (U. S. C. A., Const., Part II. p. 546); and the Tucker Act (28 U. S. C. A., §41, subd. 20), giving federal district courts concurrent jurisdiction of claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any contract, express or implied, with the Government of the United States, provided suit shall have been filed within six years after the right accrued for which claim is made.

c. Under authority of the statutes abstracted in the "Summary Statement," beginning on p. 1 hereof, local improvement districts were created in American Falls, Power County, Idaho, in the years 1915 and 1916. In regular course bonds were issued for the purpose of paying the costs and expenses of such improvements. These

bonds, which are payable to bearer (R.17), were originally sold to J. K. Mullen, who transferred the same to petitioner (R.63, 65, & 68). From time to time payments were made upon the bonds by means of annual assessments levied and collected by the municipal authorities, but all the bonds have never been paid,—$8,104.79 being the net amount unpaid as of date November 23, 1929 (R. 74). The bondholder has no claim against the municipality, his remedy, in case of non-payment, being confined to the enforcement of said assessments (R.19).

For the purpose of acquiring a Reclamation Act storage reservoir site, under authority of the act of June 17, 1902 (43 U. S. C. A. §§ 411, et seq.), agents and employees of the United States purchased the lands within said three local improvement districts from the individual owners. The first of these purchases was in 1920 or 1921 and the last in 1926 (R.131). Some of the lands were condemned, but no proceedings in eminent domain were had against petitioner or its predecessor in interest (R. 71 & 72). A sample of the contracts between the United States and the individual owners appears in the record as deft's. ex. 1 (R.144). These contracts required each owner to convey his respective land to the United States within 60 days after the Government notified such owner that his contract had been approved by the Bureau of Reclamation, and they authorized the Government to discharge any

liens or encumbrances existing against a particular lot by reserving from the purchase price whatever amount might be necessary therefor. The record does not show the date of any deed and only shows the dates of two of the contracts of purchase, namely, the first contract, which was in 1920 or 1921, and said sample contract, which bears date December 9, 1925. The Government officials proceeded with their work, the reservoir started filling in 1926, and filled in 1927 (R.131).

July 3, 1928, the city of American Falls, in conformity with its statutory duty, enacted reassessment ordinances (R.144). Apparently, these ordinances were enacted under authority of §4024 I. C. S., supra p. 3. In brief, these ordinances recite that prior assessments have proven insufficient to pay the bonds and interest thereon, fix the unpaid balance, and direct a reassessment of all property within such districts which was subject to such levies.

The Government officials in charge of the construction of the reservoir knew of petitioner's claims and withheld $13,000 or $14,000 from the amounts the Government had agreed to pay the owners of the property within the districts for the purpose of paying the same. Some time in 1929, this money was paid to the land owners (R.134). The immediate action was instituted November 25, 1929 (R.7).

The reassessments proved futile because the property

subject thereto had been completely appropriated by the Government and flooded. The money withheld by respondent from the owners to pay petitioner's bonds was paid to the owners, and since neither the municipality, the districts, nor the property owners are personally liable upon said bonds, petitioner's property, the bonds and every element of property represented thereby, was completely and permanently taken from it, within the meaning of the Fifth Amendment as interpreted by this court. Under such conditions, it is respectfully urged that the circuit court erred in concluding that "the United States is not liable for an appropriation of an interest of the bondholders in the property within the improvement district, * * *" (R.231), and that the cause is within this court's jurisdiction.

The nature of the immediate action is that of a suit against the Government upon an implied contract for the taking of the private property of petitioner for a public use, without compensation and without condemnation proceedings of any kind.

d. The cases believed to sustain said jurisdiction include the following:

United States v Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846;
Bowers v Bloomfield, 86 Atl. 428, 45 LRANS 451;
United States v Cress, 243 U. S. 316, 61 L. Ed. 746;
United States v Lynah, 188 U. S. 445, 47 L. Ed. 539;
Pumpelly v G. B. & M. C. Co., 13 Wall. 166, 20 L.

Ed. 557;
Farbwerke, et al. v Chemical Foundation, 39 Fed. (2) 366; (affirmed 283 U. S. 152, 51 S. Ct. 403);
Morrison v Clackamas County (Ore), 18 Pac. (2) 814;
Knowles v New Sweden Irr. Dist., 101 Pac. (Idaho) 81;
Bosworth v Anderson, 280 Pac. (Ida.) 227, 65 A. L. R. 1372.

## STATEMENT OF THE CASE

A statement of the case will be found in the petition for certiorari (pp. 1-8 hereof), under the heading "Summary Statement * * *," and to avoid repetition that statement is referred to and adopted as the "Statement of the Case" of this brief. Such statement is supplemented slightly by the statements in part II-c, beginning on p. 15 hereof. In the argument more detailed references will be had to the facts and evidence.

## IV.

## SPECIFICATION OF ERRORS INTENDED TO BE URGED

1. The Circuit Court of Appeals erred in concluding that the United States did not take and confiscate petitioner's bonds and property, within the meaning of the Fifth Amendment, when it completely and permanently flooded the lands within the improvement districts in question, thereby destroying said bonds and every vestige of property represented thereby.

2. The Circuit Court of Appeals erred in concluding that the immediate action was instituted "too late".

## V.

## SUMMARY OF THE ARGUMENT

A. Petitioner's bonds in and of themselves, and regardless of whether or not they are secured by liens upon the property in the improvement districts in question, constitute "property" within the meaning of the 5th Amendment, and as such are entitled to full protection.

B. The right of petitioner, as the holder of outstanding and unpaid bonds of the improvement districts, to have reassessments levied under the provisions of §§ 4024 and 4141 I. C. S. to insure payment of its bonds, constituted such a property right as the 5th Amendment protects.

C. Petitioner's bonds were actual and existing liens upon the lands within said improvement districts at the time said lands were taken by the government for public purposes. The government has taken these liens in a constitutional sense, and it has thereby become liable upon an implied contract to pay therefor.

D. The taking of petitioner's bonds and property, whether said bonds be considered as secured by liens or not, constituted such a taking of private property for public use without compensation as to render the government liable upon an implied contract.

E. Petitioner's bonds and property rights were not ac-

tually taken to such an extent as to afford petitioner a cause of action until the reservoir site was actually flooded about January 1st, 1927, hence the suit filed in 1929 was within the six year period fixed by the Tucker Act.

F. The statute of limitations is an affirmative defense and the one asserting it must prove every essential element thereof. The government has not established by any form of evidence the dates of the respective purchases from the land owners, therefore, it cannot be determined that the immediate action was filed too late, even upon the theory of the Circuit Court, to the effect that petitioner's cause of action accrued when the purchases were made of the land owners' equities in the various parcels and lots in the three districts.

## VI.

## ARGUMENT

The Circuit Court of Appeals seems to have denied petitioner relief on the ground (as to the constitutional phases of the controversy) that at the time when the United States took the land within said improvement districts for a reservoir site petitioner merely had "inchoate liens which otherwise might have matured into actual liens by reassessment." (R. 232). It is respectfully contended that this determination is erroneous for three principal reasons. In the first place, it ignores the fact that petitioner's bonds in and of themselves, and regardless

of whether or not they were secured by a lien upon the lands taken for reservoir purposes at the particular time the United States took such land, constituted valuable property, and were entitled to the full protection of the Constitution. In the second place, if such bonds were only "inchoate liens," they were at least choses in action and equally entitled to the protection of the Constitution. In the third place, the bonds actually constituted liens upon the lands within the improvement districts at the time the Government took such lands, and the Government officials had actual and constructive knowledge thereof.

The foregoing is petitioner's general position upon the constitutional question involved. Argument more in detail follows.

## POINT A

## PETITIONER'S BONDS THEMSELVES, REGARDLESS OF WHETHER THEY ARE SECURED BY LIENS, CONSTITUTE PROPERTY WITHIN THE MEANING OF THE FIFTH AMENDMENT, AND ARE ENTITLED TO PROTECTION.

**In considering this point, we ask the court to forget for the time being all questions about liens, remembering only the undeniable fact that petitioner was the owner of bonds worth in excess of $8,000, which were enforceable and worth their respective face values, together with interest, "before and at the time of the taking" by the United States (R.72).**

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. Despite this provision, the United States has taken the bonds of petitioner, which the trial court found were worth their respective face values, and their face values totalled $8,104.79 (R. 74). No compensation has been made to petitioner for these bonds. There should be no doubt about petitioner's property coming within the meaning of the term "property," as the same is used in the Fifth Amendment, because as that term is used in the Fifth Amendment it embraces every form of property which the law recognizes and protects. 12 C. J. 1212; 10 R. C. L. 74 § 65; Spring Valley W. Co. v San Francisco, 165 Fed. 667, 676. This provision of the Constitution protects real and personal property alike. 20 C. J. 665. In the case of Liggett & Myers Tob. Co. v United States, 274 U. S. 215, 47 S. Ct. 581, this court applied this doctrine to the taking without compensation of personal property in the form of tobacco. While the same principle was applied in the case of Brooks-Scanlon Corp. v United States, 265 U. S. 106, 68 L. Ed. 934, where a shipbuilding contract and rights thereunder were expropriated by the Government, the court saying in part:

> "The value of property may be greater or less than its cost; and this is true of contract rights and other intangibles as well as of physical things. It is the property, and not the cost of it, that is

protected by the 5th Amendment."

Without referring to other decisions, it seems clear that the Fifth Amendment protects private rights in all manner of lawful property from being taken by the Government for a public use without just compensation. The property so protected is not limited to lands and such visible forms of property, but includes personal property, contract rights, and intangibles as well. Unquestionably petitioner's bonds are "property" as such expression is defined by the foregoing authorities. Such being the case, the Circuit Court's opinion is patently erroneous because it concludes that the United States is not liable to petitioner, primarily on the ground that petitioner had no interest in or lien upon the physical property within the improvement districts bonded by the reservoir. In other words, the United States has appropriated and converted petitioner's property for a public use, pursuant to an act of Congress, and without compensation, and thereby it has become liable to petitioner upon an implied contract. Whether the bonds so expropriated were secured or unsecured cannot affect the result in either event the property has been taken and the liability of the Government has accrued.

## POINT II

THE RIGHT OF PETITIONER TO HAVE ITS ASSESSMENTS LEVIED UNDER PROVISIONS OF § § 4024 & 4141 I. C. S. TO INSURE PAYMENT OF ITS BONDS CONSTITUTED "PROPERTY" WHICH THE 5TH AMENDMENT PROTECTS.

The Circuit Court seems to have concluded that the property rights of petitioner which the Government expropriated were "inchoate liens which otherwise might have matured into actual liens by reassessment." (R. 929). As must be concluded from a consideration of this brief, petitioner differs radically with the Circuit Court's view, but if we concede for the sake of the argument that the only property "taken" was in the shape of "inchoate liens," does it follow that petitioner should not be compensated therefor if such "inchoate liens" were valuable, private property before the "taking" and the same are now worthless?

An inchoate lien is a property right and is generally entitled to protection equally with a completed lien. It is generally held that a mortgage or encumbrance upon real estate is property within the meaning of the Fifth Amendment. Morgan v Willman, 58 A. L. R. 1518, and note. As stated above (p. 23), this court has held that a ship-builder's contract and his rights thereunder constitute property. In the case of Farbwerke, et al., v

Chemical Foundation, 39 Fed. (2) 366 (affirmed in this court, 283 U. S. 152), the court held:

> "(5-7) The right to the accrued royalties, in whomsoever vested, is a chose in action; a chose in action is property; and an act which takes property from one person and gives it to another without legal procedure to determine their rights and without compensation is a deprivation of property without due process of law and is violative of the Fifth Amendment to the Constitution." (p. 371)

Perhaps the case of Bowers v Bloomfield, 86 Atl. (N.J.) 428, 45 LRANS 451, involves facts more nearly analogous to those now before the court than any other reported case. There, pending the making of improvements in a similar district and the levying of the assessment for such work, the county park commission instituted condemnation proceedings. While such condemnation proceedings were pending, the assessments were made and confirmed. The money was paid into court, and the question was whether the assessments should be satisfied from such funds. The court reasoned that a land owner is only entitled to just compensation for what was actually taken from him; that he is not to gain by reason of the condemnation proceedings at the expense of his neighbors; that such "just compensation" is the amount the landowner would have received had he been willing, but not compelled, to sell; that a buyer and seller would have taken into account the fact that the improvement work had been done and that assessments would certainly have

been levied in a few months, and would have deducted such assessments from the purchase price. And the court further significantly says:

> "The right of the municipalities to levy the assessment is none the less a **property right** because it is in the nature of a chose in action not yet reduced to possession; it is a claim upon the land of which every well-advised buyer and seller would take notice, and for which both would allow in the purchase price."

The latter case positively holds that the right to have reassessments levied, which right the Circuit Court of Appeals denominates "inchoate liens," is a property right and as such entitled to protection under the constitutional clause forbidding private property being taken for a public use without just compensation. The foregoing authorities demonstrate that every legitimate form of property, including choses in action, contract rights, and the right of municipalities to levy assessments, are "property" within the meaning of the Fifth Amendment. Thus, if for the sake of the argument alone, we forget that the bonds in and of themselves are property in a constitutional sense, and for like purposes concede that no liens actually existed upon the property within the districts when it was taken by the Government, nevertheless it remains that the right to have reassessments levied (the inchoate liens), afforded by § 4024 I. C. S., supra p. 3, constituted "property" within the meaning of the Fifth

Amendment. As will be shown, that property was "taken" by the United States for a public purpose and no compensation has been made to petitioner therefor, clearly rendering the Government liable to petitioner upon an implied contract. Under the authorities, it is immaterial whether liens are "inchoate" or actually in existence, if they comprise valid, valuable property and are expropriated by the government, a liability immediately arises. In failing to recognize such liability the Circuit Court of Appeals erred.

## POINT C

## PETITIONER'S BONDS CONSTITUTED ACTUAL LIENS UPON THE LANDS WITHIN THE IMPROVEMENT DISTRICT AT THE TIME SAID LANDS WERE TAKEN FOR RESERVOIR PURPOSES BY THE UNITED STATES.

Since it is petitioner's position that its property has been taken by the government for a public use, and it is entitled to just compensation therefor regardless of whether or not the bonds were a lien upon the lands within the improvement districts at the time of the taking, the writers do not feel that it is important to discuss or decide whether such liens actually existed. However, it is apparent that the Circuit Court of Appeals denied petitioner relief primarily on the ground that such lien did not exist at the time of the taking by the Government

(R. 231), and in deference to the Circuit Court's conclusion, the question is presented.

In limine, it will no doubt be admitted that the Government had constructive notice of the existence of the unpaid bonds and their statutory claim upon the lands within the districts from the fact that the districts had been created, coupled with the fact that the statutes permitted reassessments in case the amounts produced by the first assessments proved insufficient for any cause (§§ 4024 & 4141, supra pp. 3 and 5). All these statutes entered into and formed parts of the bonds as fully as though copied bodily therein. Fidelity State Bank v North Fork H. Dist., 35 Idaho 797, 209 Pac. 449, 31 A. L. R. 781. As the trial court observed, these statutes "became one of the obligations of the bond." (R. 200).

In addition, the record abundantly proves that the Government officials in charge of the construction of the project had actual notice of petitioner's unpaid bonds. This fact appears from the testimony of the Government engineer in charge, Mr. Banks (R. 134-5), and from the testimony of the other Government witness, Mr. Bohlson, who represented the Government in negotiating for the purchase of these lands and in seeing that payments therefor were made (R. 135), who testified:

> "All of the representatives of the government that had anything to do with the acquiring of title knew that these bonds (of petitioner) were out-

standing * * * after 1925." (R.136-7)

"* * * we held out an amount from each property owner that was estimated to be sufficient to retire any assessments against the property that might be levied in the future, on account of existing bonds." (R.136).

"This money was withheld pending a decision as to whether there was a valid lien against these lots or not." (R.137).

"I think that the government retained the sum of from $13,000 to $14,000 until some time in 1929 before they paid it to the land owners; * * * *" Banks (R. 134).

Thus it is irrefutable that the Government, not only had actual and constructive knowledge of the bonds outstanding, unpaid against these districts, but also recognized the same as valid, and retained from the land owners, more than enough to pay the same until some time in 1929. Why this money was paid to the land owners, rather than to the bondholders, is not clear from the record.

It is evident from the statutes that the legislature intended that the bonds should be sufficient in amount to meet all the cost and expense of installing the respective improvements. Bonds for street improvements are authorized by § 4014 I. C. S., which provides in part that in building any street improvement,

"* * * the cost and expense of which is chargeable to the abutting, contiguous or approximate property, they (the municipal authorities) may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs "at one time, and for such instalments they

> may issue, in the name of the municipality, improvement bonds of the district, **which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements** payable in installments" over a period of ten years.

Corresponding provisions are contained in § 4142 I. C. S., authorizing bonds in the case of sewerage districts.

It is clear from the foregoing statute that the intent was to make the bonds sufficient in amount to "provide for the payment of the costs and expenses" of the improvement, and that such bonds "shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements." Unless these bonds were liens upon the lots within the districts, how could a bond "include" all the assessable property in the district? The answer is, that the bonds, representing the costs and expenses of the improvements, are liens upon the property in the respective district. Said § 4014, full text of which is contained in appendix hereto, further makes provision for the issuance of other series of bonds for other improvement work in the same district, but provides that the subsequent series

> " * * * shall be a **subsequent lien * * * to the lien of the unpaid, unliquidated, and unredeemed outstanding bonds, theretofore issued for the original improvement** * * *"

By this statute the legislature of Idaho has clearly and unequivocally provided that the unpaid and outstanding

bonds of the original improvement constitute a first and prior lien upon the assessable property within the district. Strength is added to this statement by the provisions of § 4023 I. C. S. (for full text see appendix), prescribing the bondholders' rights and remedies. If the municipality fails to collect the assessments when due, the bondholder may proceed in his own name, "and shall recover, in addition to **the amount of such bonds** and interest thereon, 5 per centum, together with costs of such suit including a reasonable sum for attorney's fees." This is significant because the "amount of such bonds," and not the amount of the assessments, delimits the recovery. It is earnestly and respectfullly urged that the Circuit Court of Appeals did not give proper heed to these statutes when it held that these bonds were not a lien upon the lands within the district when the Government took the property (R. 231). The Supreme Court of Idaho recently held similar bonds liens upon the lands in the district in the case of Bosworth v Anderson, 47 Idaho 697, 280 Pac. 227, 65 A. L. R. 1372, from which we quote the following:

> "The respondents, Pacific States Savings & Loan Company, Equitable Loan Company and Portland Mortgage Company urge that because the assessment-roll was not filed by the county recorder, notice of the same did not become a lien and they were not charged with notice that there were assessment liens on the land on which they took the mortgages. **Hence the lien of the bonds is**

inferior to their mortgages or at least they are entitled to have the units of assessment segregated for their benefit.

"The statutes does not require these assessment-rolls to be filed. All parties are charged with knowledge of the law to the effect that C. S., title 32, chap. 163, art. 6 (local improvement district law), has been complied with; **the lien of the bonds upon the lands of an improvement district becomes fixed and paramount to any other lien excepting those of the general state,** county and city taxes. (C. S. 4013; Jenkins v Newman, 122 Ind. 99, 23 N. E. 683; Page & Jones, Taxation by Assessment, sec. 1068.)"

As a rule, the federal courts accept the ruling of the highest state court, interpreting state statutes. There does not seem to be any good and lawful reason to except the immediate situation from that general rule. The highest court in Idaho has positively held that similar "bonds" are a fixed and paramount lien upon the lands in the district, and this Idaho interpretation of Idaho laws should be followed by the federal courts.

The assessment is merely one step in a comprehensive statutory program, beginning with the ordinance of intention, followed by opportunity for protests, ordinance creating the district, taxation and assessment of "cost and expense" thereof upon all property in the district (§ 4005 I, C. S.—full text in appendix), opportunity to object to assessments, provision for bonds and instalment payments, annual tax levy, payments, refunding and reassessments. The effect of all these provisions is to make the

"cost and expense" of the improvement, as reflected by the bonds issued, a lien "first and paramount to any other lien excepting those of the general state, county and city taxes." A particular piece of land within the district is not relieved merely by the payment of the original assessment. The privilege of reassessment, afforded by said § 4024 (supra, p. 31), may and should be exercised by the municipality if the original assessment proves insufficient in amount "for any cause, mistake or inadvertence." The assessments and reassessments merely constitute a means of distributing the "cost and expense" of the improvement over the respective parcels and of collecting the amounts so distributed. The United States and all others dealing with titles within such districts are charged with knowledge of these laws and their workings. This is particularly true in instances like the immediate one, where the Government had full and complete actual knowledge of the unpaid and outstanding bonds.

It is true that an individual land owner may redeem his land from the original assessment by making payment in a lump sum, but that does not relieve him of reassessments later. As to this § 4019 I. C. S. provides:

> "When any piece of property has been redeemed from liability for the costs of any improvements herein provided, such property shall not thereafter be liable for further assessments for the cost of such improvements **except as hereinafter provided.**"

The section permitting reassessments (No. 4024) fol-

lows and is clearly within the meaning of the emphasized clause, "except as hereinafter provided". In this manner the statutes clearly contemplate that a particular piece of land within such districts is encumbered by its just share of the "cost and expense" of the improvement, i. e., the bonds, as apportioned by the original assessment, as well as any reassessment that may be necessary. In the immediate action, the Government well knew that a reassessment was necessary, it knew that the full "cost and expense" had not been paid by the original assessment. Under the foregoing statutes these unpaid and outstanding bonds were a fixed and paramount lien upon the lands in the districts at the time the Government took said property, although said unpaid balance may not have been redistributed and reapportioned by formal reassessment at the time of the taking.

The lien of the reassessment is part and parcel of, and relates back to, the original assessment. *Com'rs. of Sinking Fund v Linden*, 40 N.J.Eq. 27. The lien of the bonds attached prior to the taking by the Government and the situation is not comparable to an instance of general taxes levied against Government-owned land, as the Circuit Court reasoned (R. 222).

In the case of Kadow v Paul, 274 U. S. 175, 47 S. Ct. 561, this court had occasion to consider a similar improvement district and an analogous reassessment statute. The following extracts are quoted therefrom:

"The cost of the improvement is to be paid by assessment upon the property benefitted, and **all the lands included within the boundaries of the district and assessed for the improvement are to remain liable for the costs of the improvement until the same are fully paid.** (p.177)

"* * * it is said that the bonds in question, the issuing of which the plaintiffs in error are seeking to have enjoined, are to be sold under the provisions of this law with the reassessment feature as a part thereof and that they become at once a cloud upon the title of plaintiff, make it unmarketable * * * * (p. 179)

"Supplemental assessments in providing for the payment for such improvements are recognized as a legitimate part of the proceeding necessary to raise the money and to pay bonds issued to meet the cost, and if in the process of collection it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising to be included in another assessment is only meeting the to be expected cost of the improvement* * * *(Citing cases—p. 181)."

Among the cases cited in the latter opinion is that of Norris v Montezuma Valley Irr. Dist., 248 Fed. 369, wherein statutes substantially identical with those involved in the immediate cause were construed. The following extract from the latter case seems pertinent:

"In order to give to these statutes the construction contended for by defendants in error, it is necessary to read into them a provision that there shall be paid on the bonds only so much as the annual levy shall produce in money collected, whereas the **statute is peremptory that the bonds and interest shall be paid, and the remaining provi-**

> **sions only indicate the source and mode of obtaining the fund.** In order to give full force and effect to every portion of the statute there must not only be an assessment and levy, but the debt must be paid. A statutory obligation of a municipal corporation or quasi municipal corporation to pay its debts, or to fix a rate of levy necessary to provide the amount of money required to pay its debt is not satisfied by an assessment rate of levy sufficient to pay the debt if the taxes are collected, but requires that there be a sufficient assessment and levy and collection of the taxes as levied to actually pay the debt. (citing cases)."

Petition for writ of certiorari in the latter cause was denied by this court,—248 U. S. 569, 63 L. Ed. 425. There are a number of decisions along the same general lines of the two foregoing cases,—12 C. J. 1265: Klemm v Davenport, 70 A. L. R. (Fla) 156, and cases therein cited.

The necessary conclusion to be drawn from the applicable statutes and pertinent decisions is that the petitioner's bonds, representing the "cost and expense" of the improvements, constituted a lien upon the property within the district, which lien is not released by the mere payment of the original assessment, but only when the bonds are fully paid. As this court stated, in the Kadow case, " * * * all the lands included within the boundaries of the district and assessed for the improvement are to **remain liable for the costs of the improvement until the same are fully paid.**" This is the spirit and intent of the statutes (especially § 4014), and, as said in the Norris case, "the remaining provisions only indicate the source

and mode of obtaining the fund." Under these statutes and decisions petitioner's bonds were actually liens upon the lands within the districts at the time such lands were taken by the Government for reservoir purposes. The fact that the Government had thorough knowledge of the entire situation at the time of the taking of the property and before the purchase price was paid to the land owners at least adds moral strength to petitioner's claim.

## POINT D

## PETITIONER'S PRIVATE PROPERTY (THE BONDS, SECURED OR UNSECURED) HAS BEEN "TAKEN" FOR A PUBLIC USE WITHOUT COMPENSATION BEING MADE THEREFOR, AND THE GOVERNMENT IS LIABLE UPON IMPLIED CONTRACT.

In presenting this phase of the case it would not seem necessary to determine whether petitioner's bonds, at the time of the taking by the government, were absolutely unsecured, or secured by "inchoate liens," or secured by actual liens upon the property within the respective districts. In either case the bonds were property in a constitutional sense, and if that "property" was taken from petitioner by the government in connection with the construction of the American Falls Reservoir, then "the government, by the very act of taking, impliedly has promised to make compensation because the dictates of justice and the terms of the 5th Amendment so required."

(United States v Cress, 243 U. S. 316, 329, 61 L. Ed. 746).

Petitioner has consistently contended, and now adheres to that contention, that the government has openly, intentionally, and completely "taken" petitioner's property. It is not a case of mere damage or injury to one's property, or a case involving only interference with property rights, or a question of degree. Valid and enforceable bonds have been completely confiscated and appropriated, and the only value which remains for petitioner to enjoy is the parchment fragments upon wihch the bonds are printed. Once valuable bonds are now mere shadows. The "taking" is complete and permanent. A study and comparison of precedents will substantiate petitioner's contention in this respect.

In the first place, it should probably be noted that there is no personal liability on the part of the municipality or any one else to pay these bonds. It is so provided by the bonds themselves (R.19), as well as by § 4026 I. C. S. (text of statute in app.), and such has been the universal holding of the courts. Moore v City of Nampa, 276 U. S. 536, 48 S. Ct. 340; Hughes v Village of Wendell, 275 Pac. (Idaho) 1116. As the Idaho court recently stated, "* * * the very apparent purpose of the section (No. 4026) was to relieve the municipality and the property owners from personal liability." Myers v City of Idaho Falls, 11 Pac. (2) 626, 632. In brief, the bondholders only remedy is

against the property in the particular improvement district. In the light of this rule, it must be readily conceded that when the government expropriated the lands within these improvement districts it simultaneously expropriated the outstanding and unpaid bonds theretofore issued against the property of such districts. When the government flooded the lands, definitely excluding and shutting off all title and claim of petitioner and every other private owner or encumbrancer upon said lands, it thereby, as a matter of law and fact, completely appropriated and took all the rights it had not already acquired by private dealings. Such flooding directly and naturally resulted in the complete appropriation of petitioner's property, and since it was for a public use and no compensation was paid petitioner, the result is an implied promise on the part of the government to pay petitioner.

The case of Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 68 L. Ed. 934, is analogous. There an incompleted ship and the owner's building contract thereon were taken for governmental uses, and this court held that the "direct and immediate result of the requisition orders and acts of the Fleet Corporation was to take from claimant its contract and its rights thereunder." A recovery for the value of the property at the time of the taking was allowed.

The Farbwerke case, quoted from on p. 26, supra,

holding a chose in action "property" and that the taking thereof creates a liability under the 5th Amendment, is also interesting at this point of the argument.

One of the leading cases upon this question is that of United States v Lynah, 188 U. S. 445, 47 L. Ed. 539. In the latter case, in connection with the improvement of navigation in the Savannah River, certain dams and obstructions were placed and maintained in the river bed, with the result that the raising of the water above its natural height backed the water against plaintiff's embankment upon the river, interferred with the drainage of his plantation, etc. This was held to be a taking of private property within the meaning of the 5th Amendment, requiring compensation to be paid by the government, notwithstanding the work was done by the government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property overflowed. The court pointed out that this overflow was to such an extent as to "cause a total destruction of its value," and thereby the property was "in contemplation of law, taken and appropriated by the government." After discussing many authorities it was said (p. 470):

> "It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th

> Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; * * *."

The only difference between the Lamb case and the immediate one is that the property taken in the Lamb case was the "use and value" of land, while in the immediate case the property taken is the "use and value" of lands. While petitioner retains in theory at least, the physical possession of the parchment formerly designated lands, yet the same is as worthless and as completely expropriated as though the same had been perpetually submerged along with the lands of the districts in question. The direct and immediate result of the government's actions was to deprive petitioner of every essential attribute and all value of its property.

Among the many other cases along these same general lines are the following: United States v. Great Falls Mfg. Co., 112 U. S. 645, 28 Law Ed. 846; Bowers v. Bloomfield, 86 Atl. 428, 43 L. R. A. N. S. 451; United States v. Cress, 243 U. S. 316, 61 Law Ed. 746; Pumpelly v. Green Bay & M. C. Co., 13 Wall. 166, 20 Law Ed. 557; Snowden v. Port Lavaca Canal Co., 238 Fed. 430; Tucker v. United States, 285 Fed. 428; Knowles v. New Sweden Irr. Dist., 101 Pac. (Idaho) 81; and Morrison v. Clackamas County (Ore.),

(9 Pac (2) 811. In the latter case the court was interpreting a section of the Oregon constitution (for full text see app p 581) corresponding to the portion of the 5th Amendment under consideration. In the Oregon case, as part of a highway, the county built a bridge and jetty in such manner as to change the current from its former course and throw it against plaintiff's land, with the result that the soil and improvements were washed from plaintiff's land and it was "rendered utterly valueless". Among other things the court said:

> "(2) According to the more modern authorities, any destruction, restriction, or interruption of the common and necessary use and enjoyment of the property of a person for a public purpose constitutes a "taking" thereof (citing cases) * * *
>
> "(4) It is not necessary that the owner of property be actually dispossessed or that the property be completely destroyed in order to constitute a taking within the meaning of the constitutional provisions. U. S. v Cress, 243 U. S. 316 * * *."

When the law, which the foregoing authorities show to be plainly established, is applied to the facts before the court, it must be concluded that petitioner's property has been "taken" in a constitutional sense, and that a recovery should be allowed.

## POINT II

## PETITIONER'S PROPERTY WAS NOT TAKEN UNTIL THE RESERVOIR SITE WAS ACTUALLY FLOODED IN 1957, HENCE THE SUIT FILED IN 1959 WAS WITHIN THE SIX YEAR PERIOD FIXED BY THE TUCKER ACT

The conclusions of the trial court and the Circuit Court upon the question of the statute of limitations are set out in the order named, to wit:

> " * * * the statute of limitations does not begin to run **until the defendant actually takes the property** and not from the date of the deeds conveying it and that is true in these cases when we consider the provisions in the deeds from the property owners to the United States wherein it is provided that

> 'Vendor retains possession of all the buildings and improvements on the above described land, and agrees to remove the same to land outside of the American Falls Reservoir site by January 1, 1957.' " (R 199)

> "Flooding the property was not a taking where the property was already acquired for and dedicated to that purpose. The suit is too late and the District Court had no jurisdiction thereof under the Tucker Act." (R 233)

Apparently the Circuit Court concluded that when the government contracted with the individual owners of the various lots in the improvement districts for the purchase of such property for the reservoir site, and the property was later deeded to the government in conformity with such contracts, and later flooded with the waters

of the reservoir, the date of the contracts, and not the date of the flooding, fixed the date of the "taking" of petitioner's property. This reasoning might be acceptable if petitioner had been a party to such contracts and conveyances, or a party to such condemnation proceedings as were had. Petitioner was not a party to the contracts (R. 111 & def't's ex. 1), nor was it a party to any condemnation proceedings (R. 11). Therefore the purchases made by the government had no influence whatever upon petitioner's property and property rights. When the government acquires property by private purchases from the land owners the legal force and effect of such purchases are the same as those between normal citizens. Such purchases and the sequent conveyances did not disturb the rights in the property sold and conveyed then held by those not parties to the contracts and conveyances. The property rights of such third parties remained just as though the property had continued in the ownership and possession of the individual owners, that is, they so continued until the government actually took physical control and possession of the property to the exclusion of all claimants. The following provision in the contracts of purchase between the government and the individual owners conclusively establishes the fact that the Government was not even attempting to acquire more than the land owners' interest and fully recognized the rights of others:

> "7. Liens or encumbrances existing against said property may, at the option of the United States, be removed at the time of conveyance by reserving from the purchase price the amount necessary, and discharging the same with the money so reserved, * * *"

Acting under this authority, the Government withheld sufficient money to pay petitioner's bonds from "a very great number" of the land owners (R. 124). The total so withheld was "from $13,000 to $14,000" (R. 134), an amount far in excess of petitioner's claim as allowed by the trial court, the judgment in the immediate action being for the principal sum of $8,104.79 (R. 78), while the judgment in the companion case, not before this court, was only for the sum of $388.48 (U. S. v J. K. Mullen Inv. Co., 63 Fed. (2) 56). In brief, when the Government bought this property, it only acquired the bare legal title, and agreed that the vendor retain title to the improvements, which improvements such vendor must remove from the premises not later than January 1, 1927 (R. 199), or such earlier time as the same might be needed for reservoir purposes. And the Government also had the option of retaining portions of the sales prices for the purpose of discharging any liens or encumbrances existing against the property. The whole matter is summarized in the trial court's 25th finding (R. 76) in these words:

> "* * * the defendant acquired all of the property within the limits of districts 1, 2, and 8 for the reservoir purposes only, in some instances by condem-

> nation proceedings, to which the plaintiff or its predecessor in interest was not made a party, but mainly by deeds from the record owners in various and divers times between 1920 and January 1, 1927; but that the former record owners thereof retained the right of possession until January 1, 1927, and that the property was taken for a public purpose, that is to say, for the reservoir purpose, and flooded it on or shortly after January 1, 1927."

Thus, when the Government entered into these various contracts of purchase with the individual owners, it did not then acquire, or pretend to acquire, the full title, but it allowed the owners to continue to use and enjoy the property and to remove all improvements therefrom, and it fully recognized liens or encumbrances existing against said property. Surely the mere execution of contracts of such limited scope and effect did not amount to such a "taking" as would start the statute of limitation running. How can it be said that the Government took petitioner's property so long as it was recognizing petitioner's rights as a bondholder and actually retaining the land owners' money for the avowed purpose of paying petitioner's claim? The Government actually retained more than ample money for this specific purpose "until some time in 1929 before they paid it to the land owners" (R. 134).

Under such conditions there was no "taking" of petitioner's property as a matter of law. Petitioner's property was not taken until the Government actually possess-

ed the property to the exclusion of all others. This was done when, and only when, the rising waters of the reservoir forced all off the reservoir site and thereby effected absolute possession of the full title and possession on behalf of the Government in a manner hostile to, and inconsistent with, any recognition of petitioner's rights and property. In other words, the Government's contracts and deeds were not inconsistent with full recognition of petitioner's rights, because it had authority to, and did, retain enough money from the land owners to pay petitioner in full, but its refusal to pay this retained money to petitioner, coupled with the permanent and complete flooding of the land, were hostile to any claim of petitioner and constituted a constitutional taking. This "taking" occurred "on or shortly after January 1, 1927 (R. 76), and since the suit was filed Nov. 25, 1929 (R. 7), it was instituted well within the six year period fixed by the Tucker Act, and the Circuit Court erred in concluding that the "suit is too late" (R. 233).

The law applicable to this situation has been forcefully and briefly stated by this court in the case of Hurley v Kincaid, 285 U. S. 95, 52 S. Ct. 267, in these words:

> "The Fifth Amendment does not entitle him to be paid in advance of the taking."

## POINT E.

## THE STATUTE OF LIMITATIONS IS AN AFFIRMATIVE DEFENSE AND THE ONE ASSERTING IT MUST PROVE EVERY ESSENTIAL ELEMENT. THE GOVERNMENT HAS NOT ESTABLISHED THE DATES OF THE RESPECTIVE PURCHASES FROM THE LAND OWNERS, AND IT CANNOT BE DETERMINED THAT THE IMMEDIATE SUIT WAS FILED TOO LATE, UPON ANY THEORY.

The only evidence in the record as to the dates upon which the government contracted with the individual owners for the purchase of their property is defendant's exhibit one, showing that the Dahlen property was purchased Dec. 9, 1925 (R.144), and the testimony of the government's witnesses, which may be summarized in the following statement of witness Bohlson:

> "I could not say that the bulk of the purchases were after 1925 but we started in 1920 and got through in about 1926." (R.135).

Thus, it is reasonable to assume that some of the contracts were executed more than six years before the institution of the immediate action, but is is not fair or reasonable to assume, and it cannot be known, that any substantial number thereof were executed more than six years before the action was started.

The applicable law is thus stated in the Idaho case of Johnston v Keefer, 280 Pac. 324, 326:

> "The statute of limitations is an affirmative defense which imposes the burden upon the one asserting it to prove every element necessary to establish it." (citing cases)

As shown in 37 C. J. 1243, note 59, and 17 R. C. L. 1004, this is the majority rule. This seems to be the rule in the federal courts also. In the case of Jackson v United States, 24 Fed. (2) 981, 986, it was held that this rule is enforceable as against the United States government. The latter case was reversed upon another feature of the case by the Tenth Circuit Court (United States v Jackson, 31 Fed. (2) 241), and as so modified the decision was approved by this court (Jackson v United States, 281 U. S. 344, 50 S. Ct. 294). A more pertinent case is that of Borland v Haven, 37 Fed. 394, from which case we quote the following, found on p. 413 of the opinion:

> "Besides the defense (of limitations) is an affirmative one, set up by the defendants themselves, and it devolves upon them to show, affirmatively, that the bar has attached, and to what part. Now, **it does not appear how much was paid more than three years before the bringing of the suit, and the court has no evidence upon which to apply the statutory bar, if any there be, to any particular part of the sum paid.** The defense, therefore, on both grounds must be overruled."

An appeal to this court from the latter decision was dismissed (Haven v Borland, 159 U. S. 255, 40 L. Ed. 140). When it is borne in mind that the evidence in the immediate action does not reveal how many of the contracts of purchase were executed more than six years before the in-

stitution of the suit, the above quotation becomes particularly interesting and pertinent.

Under this generally recognized rule, the plea of the statute of limitations cannot be sustained in the immediate cause, even though it be conceded that the Circuit Court is right in holding that petitioner's right of action accrued when the government entered into such contracts of purchase, because the evidence completely fails to show how many of the contracts were executed more than six years before the filing of suit. The government has utterly failed to submit evidence to support its own affirmative plea and the same cannot be sustained.

## CONCLUSION

In view of the foregoing facts and authorities, it is respectfully submitted that the record presents a cause calling for the exercise of this Court's supervisory powers, in order that the decision in this cause may be harmonized with the decisions of other Circuit Courts of Appeals and with applicable decisions of this Court, and that to such ends a writ of certiorari should be granted, and that this Court should review and reverse the decision of the Circuit Court of Appeals in this cause.

Dated at Gooding, Idaho, April 18th, 1933.

Respectfully submitted,

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"§ 4005. **Ordinance creating improvement district.** By the provisions of such ordinance a local improvement district shall be established, to be called "Local improvement district No. ....," which shall include all the property fronting or abutting on, contiguous or tributary to the street to be improved, between the points named in such resolution or ordinance to the distance back from such street, if platted in blocks to the center of the block; if platted in lots to the center of the lots; and if not platted, to the distance of 125 feet.

"Such ordinance shall provide that such improvements shall be made and that the cost and expense thereof shall be taxed and assessed upon all property in such local improvement district, which cost shall be assessed in proportion to the number of feet of such lands and lots fronting thereon, or abutting, contiguous or tributary thereto, and included in said improvement district and in proportion to the benefits derived by said improvement: Provided, That the city council or trustees may expend from the general fund for such purposes such sums as, in their judgment, may be fair and equitable in consideration of benefits accruing to the general public by reason of such improvement. ('17, c. 22, § 1, part of subd. 2238f4, p. 53.)"

"§4007. **Lien of assessments: Foreclosure.** Whenever any expense or cost of work shall have been assessed on any land the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure.

"Such suit shall be in the name of the city of ..... (naming it) as plaintiff, and in any such proceedings where the court trying the same shall be satisfied that

the work has been done or material furnished, which, according to the true intent of this article, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers (1911 c 97, § 2, part of subd 2, p 99).

"§ 4013. **Special assessments for improvements—Collection.** All such assessments shall be known as special assessments for improvements and shall be levied and collected as a separate tax, in addition to the taxes for general revenue purposes, to be placed on the tax roll for collection, subject to the same penalties and collected in the same manner as other municipal taxes (1911 c 139, § 5).

"§ 4014. **Issuance of bonds to cover instalment payments.** Whenever the mayor and council or trustees of any municipality shall, under authority vested in them by any laws of this state, cause any street or avenue, or alley in such municipality, to be sidewalked, graded, curbed, planked, gravelled, paved, guttered, sprinkled, lighted, repaired, or macadamized, or any other local street improvements, provided for in section 3942 and 3944, the cost and expense of which is chargeable to the abutting, adjoining, contiguous or approximate property, they may, in their discretion, provide for the payment of the costs and expenses thereof by instalments instead of levying the entire tax of special assessments for such costs at one time, and for such instalments they may issue in the name of the municipality, improvement bonds

of the district, which shall include the adjoining, contiguous, and approximate property liable to assessment for such local improvements payable in instalments of equal amount each year, which bonds shall, by their terms, be made payable on or before a date not to exceed 10 years from and after the date of issue of such bonds, and shall bear interest not exceeding 7 per cent per annum, number of years for said bonds to run and the rate of interest thereon, within said limits, in each instance to be determined by the city council or village trustees. Provided, however, That when such bonds are issued for further, separate or additional improvement by paving street or streets, or highways that have theretofore been graded, curbed, or graveled only, under the provisions of this chapter, **then such bonds shall be a subsequent lien upon the property subject to assessment for such improvement, to the lien of the unpaid, unliquidated, and unredeemed outstanding bonds, theretofore issued for the original improvement of grading, curbing, or graveling of such street or streets or highway.** Provided further, That the grading, curbing, or graveling of street, streets, or highways, only and thereafter the paving of said street, streets or highways as shall have theretofore been graded, curbed, or graveled, as allowed and contemplated by provisions of this chapter, shall not be construed or understood as one of the same improvement, or for the same purpose or for one or the same benefit, or as a double assessment for improvements against the property to be assessed for the payment of the costs and expenses of such improvement, but shall be considered and construed as separate, distinct, single and independent improvements and benefits, to such street, streets, or highways and the property assessed for the payment of the costs and expenses there-

of. And all assessments levied or bonds issued for the payment of either or each of such improvements, shall be considered and construed as assessments levied or bonds issued for separate, distinct, single, and independent improvements and benefits on and to such street, or streets, or highways, and the property assessed for the costs and expenses of such improvement. ('19, c. 76, § 3, p. 276.)"

"§ 4023. **Bondholders' rights and remedies.** Said bonds, when issued to the contractor constructing the improvements in payment thereof, or when sold as above provided, shall transfer to the contractor, or other owner or holder, all the right and interest of such municipality in and with respect to every such assessment, and the lien thereby created against the property of such owners assessed as shall have not availed themselves of the provisions of this article in regard to the redemption of their property as aforesaid, shall authorize said contractor and his assigns, and the owners and holders of said bonds to receive, sue for and collect, or have collected such assessment embraced in any such bond or through any of the methods provided by law for the collection of assessments for local improvements.

"And if the municipality shall fail, neglect or refuse to pay said bonds, or to promptly collect any of such asessments when due, the owner of any such bonds may proceed in his own name to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction, and shall recover, **in addition to the amount of such bonds and interest thereon,** 5 per centum, together with costs of such suit including a reasonable sum for attorney's fees.

"Any number of the holders of such bonds for any

single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit.

"And such bonds shall be equal liens upon the property for the assessments represented by such bonds without priority of one over another to the extent of the several assessments against the several lots and parcels of land. (C. L. 152:95.)"

"§ 4026. **Municipality not liable.** The holder of any bond issued under the authority of this article shall have no claim therefor against the municipality by which the same is issued, in any event, except for the collection of the special assessment made for the improvement for which said bond was issued, but his remedy, in case of nonpayment, shall be confined to the enforcement of such assessments. A copy of this section shall be plainly written, printed or engraved on the face of each bond so issued. (C. L. 152:98.)"

Art. I, sec. 18, Constitution of Oregon:

"§ 18. PRIVATE PROPERTY TAKING FOR PUBLIC USE — COMPENSATION — CERTAIN USES DECLARED PUBLIC USES. — Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; provided, that the use of all roads, ways and waterways necessary to promote the transportation of the raw products of mine or farm or forest or water for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use."